



EUROPEAN COMMISSION  
SECRETARIAT-GENERAL

The Secretary General

Brussels, 16.01.2013  
SG.B.5/MM/rc – sg.dsg1.b.5(2013) 31795

Mr Olivier Hoedeman  
Corporate Europe Observatory

**By email only to:**  
***olivier@corporateeurope.org***  
***ask+request-249-***  
***0fa02aacasktheeu.org***

**Subject:           Confirmatory application for access to documents**  
**Ref. GestDem 2012/5001**

Dear Sir,

I am responding to your confirmatory application submitted by email of 23 November 2012 through the *asktheeu* website.

You appeal the response given on 22 November 2012 by the Director of Directorate B of the Secretariat-General to your initial application of 26 October 2012.

**1. SCOPE OF YOUR REQUEST**

In your email of 26 October 2012, you requested access to: *all documents related to Commissioner Dalli's resignation over the issues covered in the OLAF investigation, including all minutes (and other notes) of meetings, all correspondence (including by email), both internal and external, and any other documents held by the Commission on these matters*".

You further indicate that: *this request does not only cover documents related directly to the OLAF report, but also the Commission's discussions more generally on the matter of Mr Dalli and the contacts between Silvio Zammit and the tobacco industry, the Commission's contacts with Swedish Match and ESTOC on this issue, etc.*".

**2. GROUNDS FOR YOUR CONFIRMATORY APPLICATION**

In your confirmatory application, you appeal the response given by the Secretariat-General on three grounds:

- 1) You consider that the list of documents attached to the response is not complete.
- 2) You appeal the decision not to grant access to:
  - a) two letters from Mr Dalli to President Barroso, dated 27 July and 24 October 2012;
  - b) the letter from President Barroso to Mr Dalli dated 23 October 2012;
  - c) two notes for the file concerning meetings between President Barroso and Mr Dalli.
- 3) You consider that parts of your initial request were not handled. You mention:
  - a) contacts between Mr Zammit and the tobacco industry;
  - b) the Commission's contacts with Swedish Match and ESTOC on this issue;
  - c) the OLAF report.

### **3. PARTS ALLEGEDLY NOT COVERED BY THE INITIAL RESPONSE**

As regards points 1 and 3 b), I enclose an exchange of emails with Swedish Match, which is the only correspondence of the Commission with Swedish Match or ESTOC in relation to Mr Dalli's resignation.

Concerning point 3 a), the Commission is not in possession of any exchanges between Mr Zammit and the tobacco industry.

Furthermore, your request mentioned under point 3 c) to obtain the OLAF report was not mentioned explicitly in your initial request of 26 October 2012. This part of your application has been forwarded to OLAF. According to the detailed rules for the application of Regulation No 1049/2001<sup>1</sup>, applications for access to documents related to OLAF investigations are handled by OLAF, both at the initial and at the confirmatory stage.

Finally, you will find attached a note signed jointly by the Director-General of the Legal Service and the Secretary-General concerning the Tobacco Products Directive, which has been made public under Regulation 1049/2001.

### **4. DOCUMENTS TO WHICH NO ACCESS WAS GRANTED**

#### **4.1. Scope of the confirmatory application**

Contrary to what you state in your confirmatory application, the letter from President Barroso to Mr Dalli dated 23 October 2012 was disclosed to you. Moreover, this letter has been made public on the Commission's RAPID database accessible through the EUROPA website.

---

<sup>1</sup> Commission Decision 2001/937 of 5 December 2001, OJ L 345 of 29.12.2001, p.94

Access to the two letters from Mr Dalli to President Barroso as well as to the two notes to the file was refused as they contain precise information on the exchanges between the President and Mr. Dalli and in particular on the conduct of their meetings.

In the initial response, it was argued that, even if these four documents are not part of the OLAF investigation file, they are nevertheless directly related to it.

#### **4.2. Arguments put forward in your confirmatory application**

You argue that the Commission already took action on the OLAF investigation, which has been completed. You further argue that Mr Dalli's resignation is a finalised matter and that the case is closed.

#### **4.3. Protection of the purpose of the investigation**

As a matter of fact, OLAF has concluded its investigation by transmitting its file to the Maltese authorities. The investigation on Mr Dalli's conduct in relation to the events leading to the complaint by Swedish Match is now being pursued by the competent Maltese authorities. The OLAF investigation is only the first stage of the investigation, which continues at national level. The findings of OLAF are now in the hands of the Maltese authorities which will eventually decide whether or not further action is required. Disclosing documents related to the OLAF investigation at this stage would interfere with the investigative proceedings currently carried out by the competent Maltese authorities.

Furthermore, the two notes requested will be part of any follow-up actions the Commission may decide to undertake following the OLAF investigation and the subsequent national investigation which is currently on-going. In these circumstances, disclosure of these documents, at this stage, would clearly undermine the purpose of such follow-up actions. Indeed, early disclosure of these documents would facilitate and encourage criticism which, either by express design or inevitable effect, would interfere with the Commission's ability to conduct any follow-up actions and ultimately, the Commission's capacity to adopt final decisions in the general interest of the Union, free from external influences.

Consequently, the exception set out in Article 4(2) third indent of Regulation 1049/2001 clearly applies.

#### **4.4. Partial access**

Since the four documents requested deal exclusively with the issue of Mr Dalli's exchanges with President Barroso regarding the events that led him to the decision to resign, no partial access, as provided for in Article 4(6) of Regulation 1049/2001 can be granted.

#### **4.5. Overriding public interest**

You argue that there is an obvious overriding public interest in disclosure of the documents in question as "there is an urgent need for clarification about what exactly has happened".

Full clarification of the facts and of the role played by different actors is precisely the purpose of the investigation currently being conducted by the Maltese judicial authorities.

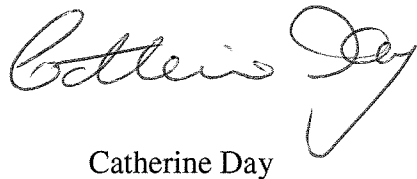
The public interest in making the content of these four documents public does not in my view outweigh the need to safeguard the integrity of the on-going judicial investigation. Moreover, as regards the protection of Mr Dalli's integrity, Article 4(1) (b) of Regulation 1049/2001 does not provide for a public interest test.

Consequently, an overriding public interest in disclosing the four documents in question has not been demonstrated.

#### **4.6. Means of redress**

Finally, I draw your attention to the means of redress available against this decision as far as access to certain data contained in the requested document is refused. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Catherine Day', with a large, stylized flourish at the end.

Catherine Day

Enclosures: (2)